IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	**CRIMINAL**
	:	
vs.	:	
	:	
RIGOBERTO BARRIOS-LUVIANO	:	**NO. 98-591**

MEMORANDUM AND ORDER

O R D E R

DUBOIS, J. **AUGUST 30, 2000**

AND NOW, to wit, this 30th day of August, 2000, upon consideration of the Pro Se Motion of Defendant, Rigoberto Barrios-Luviano, for Reduction of Sentence Pursuant to 28 U.S.C. § 2255 (Document No. 22, filed June 28, 2000), and the Government's Response to Petition Under 28 U.S.C. § 2255 (Document No. 25, filed August 23, 2000), **IT IS ORDERED** that the Pro Se Motion of Defendant, Rigoberto Barrios-Luviano, for Reduction of Sentence Pursuant to 28 U.S.C. § 2255 is **DENIED.**

IT IS FURTHER ORDERED that a certificate of appealability will not be granted because petitioner has not made a substantial showing of a denial of a constitutional right. (28 U.S.C. § 2253(c)).

MEMORANDUM

I. INTRODUCTION

Defendant, Rigoberto Barrios-Luviano, was convicted of illegal re-entry into the United States following deportation in violation of 8 U.S.C. § 1326. He was sentenced on May 11, 1999 to

a term of imprisonment of forty-six months. Defendant did not file a direct appeal.

II. DISCUSSION

A. The Motion is Time Barred

Defendant was sentenced on May 11, 1999. The sentence became final ten days later, when the time to appeal expired. Capral v. United States, 166 F.3d 565 (3d Cir. 1999).

The § 2255 Motion was dated June 21, 2000. The envelope in which it was mailed to the Court was postmarked June 21, 2000. It was not actually filed until June 28, 2000.

A pro se prisoner's habeas petition is deemed filed at the moment he delivers it to prison officials for mailing to the district court. Burns v. Morton, 134 F.3d 109, 113 (3d Cir. 1998). Petitioner has not provided the Court with the date he handed his Habeas Motion to prison officials. In the absence of this information, the Court will treat the date placed on the Motion by petitioner, June 21, 2000, as the date the Motion was delivered to prison officials for mailing.

Motions under § 2255 must be filed within one year of the date a sentence becomes final. That means petitioner had one year from May 21, 1999, within which to file his motion, and he did not do so. Because defendant, Barrios-Luviano's, Motion was not filed within that one year period, it is time barred. In reaching this conclusion, the Court notes that none of the possible grounds for

extending the one year period which are listed in § 2255 applies in this case. Defendant, Barrios-Luviano, has not asserted any Government action or other extraordinary circumstance which prevented him from filing a timely motion, and the matter does not involve a newly created right or newly discovered facts.

B. The Motion is Meritless

Defendant contends that, as a result of his status of a deportable alien, he may not be eligible while incarcerated for a minimum security confinement, drug programs, and pre-release community confinement, all of which he claims are available to inmates who are not deportable aliens. For that reason, he argues that he was entitled to a two level downward departure at sentencing, and that his attorney at sentencing was ineffective for not seeking that reduction in offense level.

The Motion does not assert that defendant is actually suffering from any of the claimed adverse consequences in custody at the present time. But even if he were denied certain benefits in prison as a result of his status as a deportable alien, he would not be entitled to a downward departure. That conclusion is based on the fact that there is no evidence defendant was prejudiced by his attorney's failure to raise the issue at sentencing. Absent prejudice, defendant is not entitled to habeas relief. See Strickland v. Washington, 466 U.S. 668, 697 (1984) ("a court need not determine whether counsel's performance was deficient before

examining the prejudice suffered by the defendant as a result of the alleged deficiencies . . . [i]f it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed").

Defendant was sentenced pursuant to § 2L1.2 of the United States Sentencing Guidelines which is entitled "Unlawfully Entering or Remaining in the United States." It is obvious that the Sentencing Commission took defendant's status as an alien into effect in creating that guideline. By its terms, the guideline applies only to persons who are present in the United States illegally. Thus, every person convicted under 8 U.S.C. § 1326 to whom this guideline is applicable is subject to deportation. That being so, it cannot be said that the defendant's situation differs from the "heartland" of cases to which the guideline applies. Under those circumstances, there is no basis for a downward departure under § 5K2.0 of the Guidelines and Koon v. United States, 518 U.S. 81, 96 (1996) which provide for departures in cases where a defendant's circumstances differ from the "heartland" to which the applicable guideline applies.

None of the case law cited by defendant is to the contrary. The primary case on which he relies, United States v. Smith, 27 F.3d 649 (D.C. Cir. 1994) involved a drug conviction, not a conviction for illegal re-entry, and it is therefore inapplicable

to this case. Moreover, the conclusion in Smith that conditions of incarceration faced by deportable aliens may be considered as a possible ground for departure in a non-immigration case has been rejected by the majority of courts to consider that issue. See United States v. Restrepo, 999 F.2d 640, 645-47 (2d Cir.), cert. denied, 510 U.S. 954 (1993); United States v. Nnanna, 7 F.3d 420, 422 (5th Cir. 1993), cert. denied, 511 U.S. 1036 (1994); United States v. Mendoza-Lopez, 7 F.3d 1483, 1487 (10th Cir. 1993); United States v. Veloza, 83 F.3d 380, 382 (11th Cir. 1996). The Court also notes that the Third Circuit in United States v. Marin-Castaneda, 134 F.3d 551, 554-56 (3d Cir.), held that an alien's agreement to deportation following conviction generally does not justify a downward departure, cert. denied, 523 U.S. 1144 (1998).

Every appellate court to consider the precise question raised in this case - whether defendant's status as a deportable alien justifies a downward departure at sentencing in a prosecution for illegal re-entry - has ruled that such a departure is impermissible. See, e.g., United States v. Ebolum, 72 F.3d 35 (6th Cir. 1995). The Sixth Circuit held in that case that ". . . deportable alien status may not be a basis for downward departure from a sentence imposed under a guideline that applies primarily to aliens who are deportable, because the Sentencing Commission must have taken such status into account when formulating that guideline." Id. at 39; see also United States v. Gonzalez-

Portillo, 121 F.3d 1122, 1124-25 (7th Cir. 1997), cert. denied, 522 U.S. 1061 (1998); United States v. Martinez-Ramos, 184 F.3d 1055, 1057-59 (9th Cir. 1999).

Defendant also contends that the disparate sentences that result between alien and American inmates as a consequence of immigration detainers lodged automatically against alien inmates constitutes a violation of equal protection under the law. This equal protection argument relates to an action of the United States Bureau of Prisons taken in the execution of the Court's sentence and may not be raised in a § 2255 motion. A motion under 28 U.S.C. § 2255 is limited to a challenge to the sentence as imposed; an objection to the execution of a sentence must be presented under 28 U.S.C. § 2241. See, e.g., United States v. Barrett, 178 F.3d 34, 50 at fn. 10 (1st Cir. 1999), cert. denied, 120 S.Ct. 1208 (2000); see, e.g., Gomori v. Arnold, 533 F.2d 871, 874 (3d Cir.), cert. denied, 429 U.S. 851 (1976).

III. CONCLUSION

For all of the foregoing reasons, the Pro Se Motion of Defendant, Rigoberto Barrios-Luviano, for Reduction of Sentence Pursuant to 28 U.S.C. § 2255 is denied.

BY THE COURT:

JAN E. DUBOIS, J.